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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION, INC.,
*Petitioner,*

v.

CLIFFORD L. ALLENBY; JOHN K. VAN DE KAMP, ESQ.,
*Respondents.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Are point-of-sale warning requirements imposed by a California statute ("Proposition 65") upon manufacturers of consumer pesticides preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1988 & Supp. II 1990), which defines pesticide labeling broadly, vests the United States Environmental Protection Agency ("EPA") with comprehensive and exclusive authority to determine through regulation of labeling what warnings manufacturers should provide, and expressly prohibits any state requirements for labeling in addition to or different from those imposed by EPA?

Are point-of-sale warning requirements imposed by California Proposition 65 upon manufacturers of consumer products containing hazardous substances preempted by the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261-1277 (1988 & Supp. II 1990), which defines labeling broadly, vests the federal Consumer Product Safety Commission ("CPSC") with comprehensive and exclusive authority to determine through regulation of cautionary labeling for consumer products what warnings manufacturers should provide, and expressly prohibits a state from establishing different cautionary labeling requirements for the same risks?

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## PETITION FOR A WRIT OF CERTIORARI

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 958 F.2d 941 (9th Cir. 1992), and is reproduced herein as Appendix ("App.") A at 1a. The decision of the United States District Court for the Northern District of California is reported at 744 F. Supp. 934 (N.D. Cal. 1990), and is reproduced herein as App. B at 20a.

### JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 11, 1992. *Chemical Specialties Manufacturers Ass'n v. Allenby*, 958 F.2d 941 (9th Cir. 1992). This Court has jurisdiction under 28 U.S.C. § 1254(1) (1988).

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case arises under Article VI, Clause 2, of the United States Constitution (the "Supremacy Clause"), which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. The two federal statutes involved are the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1988 & Supp. II 1990), and the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. §§ 1261-1277 (1988 & Supp. II 1990). The California state statute and regulations in question are the California Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65"), Cal. Health & Safety Code §§ 25249.5-.13 (West Supp. 1992), and the regulations promulgated thereunder, Cal. Code Regs. tit. 22, §§ 12000-14000 (1991). The relevant portions of these statutes and regulations are set out verbatim in Petitioner's Appendix. App. C at 27a (FIFRA), 28a (FHSA), 38a (Proposition 65), and 31a (Cal. Code Regs. tit. 22, § 12601).

## STATEMENT OF THE CASE

This case raises two parallel federal preemption issues: Whether California Proposition 65 point-of-sale warning requirements imposed upon manufacturers of consumer pesticides are preempted by FIFRA, and whether the same Proposition 65 warning requirements imposed upon manufacturers of other consumer products containing hazardous substances are preempted by FHSA. Each of these federal statutes vests a federal agency (the United States Environmental Protection Agency and the Consumer Product Safety Commission, respectively) with

comprehensive authority to regulate manufacturers' cautionary labeling, and each contains a provision which expressly preempts the States from establishing their own cautionary labeling requirements.

Petitioner Chemical Specialties Manufacturers Association, Inc. ("CSMA")[1] is a national trade association consisting of over four hundred companies that manufacture, formulate, distribute and sell throughout the United States, consumer products which are regulated under either FIFRA or FHSA. Concerned that Proposition 65 point-of-sale warning requirements undermine the integrity and uniformity of federally regulated cautionary labeling, and thereby jeopardize the health and safety of consumers whom the federal programs are intended to protect, Petitioner filed a Complaint in federal district court on March 2, 1989 seeking a declaratory judgment that Proposition 65 point-of-sale warning requirements for consumer products containing either pesticides or other hazardous substances are preempted by federal law.[2]

Proposition 65 is a first-of-its-kind public Initiative Measure that was conceived and promoted by environmentalist groups and approved by California voters in November 1986. *See* Cal. Health & Safety Code §§ 25249.5-.13, ch. 6.6. It establishes the following warning requirement:

> No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning . . . .

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[1] CSMA has no corporate parent, and no subsidiaries which are not wholly-owned.

[2] The Complaint was originally filed in the Southern District of California, but subsequently transferred to the Eastern District of California, and then to the Northern District of California. *See Chemical Specialties Manufacturers Ass' v. Allenby*, 744 F. Supp. 934, 935 (N.D. Cal. 1990).

Cal. Health & Safety Code § 25249.6. Implementing regulations provide that manufacturers of consumer products containing "a chemical known to the state to cause cancer or reproductive toxicity in an amount which requires a warning *shall provide a warning* to any person to whom the product is sold or transferred unless the product is packaged or labeled with a clear and reasonable warning." Cal. Code Regs. tit. 22, § 12601(b)(5) (emphasis added). The required warning is intended to flow with the product through the chain of distribution from the manufacturer to the purchaser at the point of sale. *See* Cal. Health & Safety Code § 25249.11(f) (requiring that implementing regulations "shall to the extent practicable *place the obligation to provide any warning materials such as labels on the producer or packager* rather than on the retail seller") (emphasis added); *see also* Cal. Code Regs. tit. 22, § 12601(b)(2); Final Statement of Reasons (accompanying Cal. Code Regs. tit. 22, § 12601) (Oct. 6, 1988) (explaining that manufacturers must provide warning materials to accompany the product so that the retailer can transmit them to the consumer).

The Proposition 65 regulations also specify the warning language to be provided:

> The warning message must include the following language:
>
> (A) For consumer products that contain a chemical known to the state to cause cancer:
>
> "WARNING: This product contains a chemical known to the State of California to cause cancer."
>
> (B) For consumer products that contain a chemical known to the state to cause reproductive toxicity:
>
> "WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm."

Cal. Code Regs. tit. 22, § 12601(b)(4).

The regulations authorize three "safe harbor" methods for transmitting the required Proposition 65 warnings:

(i) labels and labeling, (ii) shelf labeling and signs, and (iii) a system of signs with toll-free information services. *Id.* § 12601(b)(1). Each of these methods requires manufacturers to ensure that upon sale or transfer of a product, it is accompanied by product-specific written or graphic warning materials, which must be conspicuously displayed by retailers at the point of sale so as to render them "likely to be read and understood by an ordinary individual under customary conditions of purchase or use." *Id.* § 12601(b)(3); *see also id.* § 12601(b)(5); *Ingredient Communication Council, Inc. v. Van de Kamp*, No. 504601, slip op. at 14 (Cal. Super. Ct. Aug. 22, 1989) (holding that Proposition 65 requires an "in-store notification system which provides product-specific warnings"), *finalized without change* (Oct. 30, 1989), *aff'd*, 2 Cal. App. 4th 1480, 4 Cal. Rptr. 2d 216 (1992).

FIFRA vests the United States Environmental Protection Agency ("EPA") with comprehensive and exclusive authority to regulate pesticide labeling, which FIFRA defines broadly to include all "written, printed, or graphic matter . . . accompanying the pesticide . . . at any time." 7 U.S.C. § 136(p)(2) (1988). Among other human health hazards, FIFRA addresses cancer and reproductive toxicity, the same two types of hazards covered by Proposition 65 warning requirements. *See* 40 C.F.R. § 154.7(a)(2) (1991). Section 24(b) of FIFRA expressly preempts any state requirements for labeling "in addition to or different from" those established by EPA pursuant to FIFRA. 7 U.S.C. § 136v(b) (1988).[3]

FHSA vests the federal Consumer Product Safety Commission ("CPSC") with comprehensive and exclusive authority to regulate cautionary labeling for "hazardous

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[3] FIFRA § 24(a), 7 U.S.C. § 136v(a), allows states to regulate "the sale or use of any federally registered pesticide," so long as such regulation does not interfere with EPA's exclusive regulation of labeling. *See Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2486 (1991).

substances," defined so as to exclude pesticides regulated under FIFRA. 15 U.S.C. § 1261(f)(2) (1988). FHSA's definition of "hazardous substance" includes substances which are "toxic," which in turn includes chemicals that can cause cancer or reproductive toxicity as a result of reasonably foreseeable handling or use. 15 U.S.C. § 1261 (f)(1)(A); CPSC Advisory Op. No. 309 (Mar. 19, 1987), at 2. Therefore, FHSA applies to products which may cause cancer or birth defects, the same toxic risks addressed by Proposition 65.

Section 18(b)(1)(A) of FHSA expressly preempts any different state cautionary labeling requirements addressing the same risks covered by FHSA cautionary labeling. 15 U.S.C. § 1261 note (b)(1)(A). Under FHSA, labeling encompasses "all accompanying literature where there are directions for use, written or otherwise." *Id.* § 1261(n)(2). CPSC regulations define "accompanying literature" to include point-of-sale placards, signs, or other displays. 16 C.F.R. § 1500.3(c)(9) (1992).

The district court had jurisdiction over Petitioner's declaratory judgment action pursuant to 28 U.S.C. §§ 2201 and 1331 (1988). Petitioner and Respondents (California State Government officials) filed cross-motions for summary judgment. The district court ruled in favor of Respondents, holding that there was no federal preemption. *Chemical Specialties Manufacturers Ass'n v. Allenby*, 744 F. Supp. 934 (N.D. Cal. 1990), App. B at 20a.[4] Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, which conducted a *de novo* review of the district court's decision. *Chemical Specialties Manufacturers Ass'n v. Allenby*, 958 F.2d 941 (9th Cir. 1992), App. A at 1a.

Parallel preemption arguments under FIFRA and FHSA were presented by Petitioner to the court of appeals. With respect to consumer pesticides, Petitioner

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[4] The district court incorporated by reference its anti-preemption FIFRA holding in *d-Con Co. v. Allenby*, 728 F. Supp. 605, 607 (N.D. Cal. 1989).

argued that Proposition 65 warning requirements are expressly preempted by FIFRA § 24(b), since they are state requirements for labeling in addition to and different from those required by EPA pursuant to FIFRA. Petitioner also contended that even if Proposition 65 point-of-sale warnings are not labeling, they are impliedly preempted by FIFRA because they frustrate Congress' goals for, undermine the integrity of, and interfere with the national uniformity of, EPA's cautionary labeling for each pesticide product.

The Ninth Circuit held that Proposition 65 warnings are not FIFRA labeling (improperly distinguishing this Court's holding in *Kordel v. United States*, 335 U.S. 345 (1948)). *Allenby*, App. A at 9a. Furthermore, the court of appeals explicitly declined to consider the question of frustration of congressional purpose, and rejected Petitioner's other implied preemption arguments under FIFRA. *Id.* at 13a-16a.

The Ninth Circuit also held that Proposition 65 warnings are not expressly or impliedly preempted by FHSA. *Id.* at 16a-19a. Petitioner contended that Proposition 65 point-of-sale warning signs for consumer products containing hazardous substances are labeling within the meaning of FHSA, and therefore, are barred by FHSA's express preemption provision. In this regard, Petitioner submitted, but the court of appeals failed to consider, a formal Advisory Opinion from CPSC's General Counsel interpreting FHSA's cautionary labeling provisions as encompassing Proposition 65 warnings. CPSC Advisory Op. No. 312 (Mar. 6, 1991), App. D at 39a. Petitioner also argued that even if Proposition 65 warnings are not FHSA labeling, they are preempted because they frustrate the congressional purpose of nationally uniform labeling.

## REASONS FOR GRANTING THE WRIT

This case raises a nationally significant issue: Do the States have free reign to undermine the integrity of federally regulated cautionary labeling for consumer prod-

ucts containing pesticides or other hazardous substances by requiring manufacturers to give different and even conflicting warnings for the same products at the point of sale? The court of appeals circumvented this critical issue by focusing on the narrow question of whether point-of-sale warning signs for cancer and reproductive toxicity required by California Proposition 65 are "labeling" within the meanings of FIFRA and FHSA, and by erroneously concluding that they are not.

If left undisturbed, this ruling, which conflicts with the Supreme Court's long-standing, broad view of the term "labeling" in federal regulatory statutes, will clear the way for California, whose huge population accounts for a substantial percentage of consumer pesticides and household hazardous substances used in the United States, to expand Proposition 65 or enact similar laws to mandate warnings that would be different for any type of hazard (e.g., acute toxicity, flammability, corrosivity, explosivity) already covered by federally regulated FIFRA and FHSA cautionary labeling. Moreover, because other States look to California as a legislative trendsetter (Proposition 65 was the first law of its kind in the United States), there is a distinct possibility that, as a result of the Ninth Circuit's decision, numerous States each will enact its own Proposition 65-type warning scheme. The court's ruling allows each State to utilize its own risk criteria and to devise its own warning language, even if they conflict with those of other States, as well as with those of EPA or CPSC.[5] Thus, because this case will have far-reaching, nationwide consequences for the FIFRA and FHSA cautionary labeling programs for consumer products, the Supreme Court should exercise its discretionary jurisdiction to review the Ninth Circuit's defective and deficient preemption analysis.

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[5] States which are considering or have considered enacting Proposition 65-type statutes include New York, Massachusetts, West Virginia, Illinois, Ohio, Tennessee, Louisiana, Washington, Oregon, and Hawaii.

## I. THE FEDERAL PREEMPTION ISSUE IN THIS CASE IS OF PARAMOUNT IMPORTANCE TO PRESERVING THE INTEGRITY OF FEDERAL CAUTIONARY LABELING FOR PESTICIDES AND OTHER HAZARDOUS SUBSTANCES

The fundamental purpose of nationally uniform, federally regulated cautionary labeling is to protect the health and safety of persons who purchase or use pesticides or other products containing hazardous substances. If the Ninth Circuit's decision is allowed to stand, California and every other State will be free to frustrate that purpose by second-guessing or ignoring federal warning determinations, which are reflected on each consumer product's federally regulated labeling, and by enacting different or conflicting point-of-sale warning requirements for the same product.

For example, if EPA finds that the weight of toxicology evidence on a particular pesticide indicates no significant human health risk of cancer or reproductive effects, EPA will not require a label warning. If that same pesticide, however, is listed under the inflexible criteria of Proposition 65 as a carcinogen and reproductive toxin, Proposition 65 point-of-sale cancer and reproductive toxicity warnings will be required. Thus, Proposition 65 warnings will conflict or be inconsistent with EPA warning determinations. As another example, a consumer product which poses a *possible* cancer risk would require a Proposition 65 point-of-sale warning using the signal word "Warning" and the phrase "Known to the State to Cause Cancer," even though that differs from the wording of the cautionary labeling required under FHSA, which incorporates a careful hierarchy of signal words depending upon the degree of risk presented (e.g., "*Caution*" in the case of possible carcinogens, and "Warning" only in the case of *known* carcinogens). *See* 15 U.S.C. § 1261(p)(1). By universally requiring the signal word "Warning," Proposition 65 deviates from federal practice on signal

words and creates conflicts or inconsistencies with federal cautionary labeling.

Consequently, unless Proposition 65 warning requirements are preempted, manufacturers will be confronted with the perilous task of giving conflicting or inconsistent federal and state warnings about the same product. Federal cautionary labeling, which now reflects careful, product-by-product scientific determinations under FIFRA or FHSA as to the specific hazards to be addressed and the precise warning information to be given, will become a source of uncertainty and confusion, if not altogether superfluous. By undermining the integrity of the federal labeling program under FIFRA and FHSA, Proposition 65 jeopardizes Congress' primary means for protecting the health and safety of consumers. Indeed, to prevent this very result, Congress included in both FIFRA and FHSA provisions which expressly preempt any additional or different State requirements for labeling, such as those imposed upon manufacturers by Proposition 65.

Cautionary labeling is the regulatory centerpiece and principal enforcement mechanism of both FIFRA and FHSA. It is the means by which EPA or CPSC ensures that product manufacturers communicate to purchasers and users the *precise* warnings (and precautionary information) which the federal government has determined are necessary to protect the health and safety of the consumer. Indeed, the whole purpose of federally regulated labeling is to get consumers to read, understand and follow label warnings and precautionary information.[6]

In the case of FIFRA, rather than include every conceivable warning and hazard on a pesticide's label or labeling, EPA painstakingly assesses scientific data on each regulated pesticide product to ensure that the warnings provided are only those which truly are necessary,

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[6] FIFRA makes it unlawful for any person "to use any registered pesticide in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G).

that they are worded accurately and appropriately in comparison to other warnings on the same label and on labels of similar products, and that their impact is not diluted by unnecessary, conflicting, or inconsistent warnings. FIFRA's preemption provision, section 24(b), enables EPA to accomplish this congressional objective of protecting consumers.

In *New York State Pesticide Coalition, Inc. v. Jorling*, 704 F. Supp. 26 (N.D.N.Y.), *aff'd*, 874 F.2d 115 (2d Cir. 1989), the federal district court explained FIFRA § 24(b) as follows:

> This court reads the language of 7 U.S.C. § 136v (b) which prohibits states from requiring labeling "in addition to or different from" that approved by the EPA *as having its main focus upon preserving the force of the information contained in the FIFRA label. Attention to the label's dictates would work to prevent "unreasonable adverse effects on the environment."* 7 U.S.C. § 136a(c)(5).
>
> . . . Moreover, it is likely that in defining the precise informational content of a label the EPA is concerned as much with what goes into the language of the label as what does not. *Placing every potential warning or use requirement onto the label could operate to dilute the most important instructions and thus violate the EPA's exclusive authority to label.*

704 F. Supp. at 29-30 (emphasis added). Thus, requiring a pesticide manufacturer to provide a cancer or reproductive toxicity warning which is unnecessary, or is worded in a way that implies a greater hazard than actually exists, detracts from other warnings (e.g., acute hazard to eyes or skin) which are necessary and must be followed by purchasers and users for their own protection.

This is no less true for Proposition 65 point-of-sale warnings than for conflicting or inconsistent warnings appearing on the face of a federally mandated pesticide label. Similarly, in the case of consumer products regulated by FHSA, Congress sought to ensure that caution-

ary labeling is not encumbered by unnecessary warnings, "thus inviting indifference to cautionary statements on packages of substances presenting a real hazard of substantial injury or illness." H.R. Rep. No. 1861, 86th Cong., 2d Sess. (1960), *reprinted in* 1960 U.S.C.C.A.N. 2833, 2837. Therefore, ensuring that consumer products are "free of differing labeling requirements was clearly of foremost concern to Congress in enacting the [FHSA] preemption provision." *Chemical Specialties Manufacturers Ass'n v. Lowery*, 452 F.2d 431, 438 (2d Cir. 1971).

The Ninth Circuit's opinion is an open invitation for California to adopt warning requirements for any federally regulated hazard, and for other States to enact their own versions of Proposition 65, thereby further sabotaging the exclusively federal, cautionary labeling programs established by Congress through enactment of FIFRA and FHSA. The crucial issue raised by the Ninth Circuit's anti-preemption ruling, therefore, is whether these federal programs should be permitted to fulfill their intended purpose of protecting the public, unobstructed by as many as fifty different state point-of-sale warning schemes for consumer product manufacturers. This is a question worthy of Supreme Court review because of the disastrous consequences which otherwise will follow from the Ninth Circuit's opinion.

## II. THE NINTH CIRCUIT'S DECISION JEOPARDIZES FIFRA'S PESTICIDE LABELING PROGRAM BY ALLOWING STATES TO UNDERMINE FEDERAL PRODUCT-SPECIFIC WARNINGS INTENDED TO PROTECT PUBLIC HEALTH AND SAFETY

### A. Congress Expressly Preempted State Requirements for Pesticide Labeling By Authorizing EPA Alone to Specify Nationally Uniform Cautionary Labeling for Each Pesticide Product

Twice before this Court has recognized that "FIFRA's historic focus [is] on labeling." *Mortier*, 111 S. Ct. at 2486 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986,

991 (1984)). "FIFRA as originally adopted 'was primarily a licensing and labeling statute.'" *Mortier*, 111 S. Ct. at 2479 (quoting *Monsanto*, 467 U.S. at 991). When Congress rewrote FIFRA in 1972, it "significantly strengthened FIFRA's registration and labeling standards." 111 S. Ct. at 2479. Indeed, "the general goal of the 1972 amendments [was] to strengthen existing labeling requirements and insure that these requirements were followed in practice." *Id.* at 2486 (citations omitted). In this manner, Congress sought to "protect man and his environment," including by "extend[ing] Federal pesticide regulation to actions entirely within a single State." S. Rep. No. 838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 3993.

### 1. *EPA's Broad Authority Over Pesticide Labeling*

To protect public health and the environment, Congress has vested EPA with comprehensive and exclusive authority to regulate pesticide labeling.[7] Pursuant to this authority, "EPA has regulated almost every aspect of pesticide labeling." *Papas v. Upjohn Co.*, 926 F.2d 1019, 1024 (11th Cir. 1991), *petition for cert. filed sub nom. Papas*

[7] "Labeling" means "all labels and all other written, printed, or graphic matter—(A) accompanying the pesticide . . . at any time; or (B) to which reference is made on the label or in literature accompanying the pesticide." 7 U.S.C. § 136(p)(2). EPA may register a pesticide only if it first determines that the product, when used in accordance with its labeling, will not cause "unreasonable adverse effects" to man or the environment. *Id.* §§ 136a(c)(5), 136(bb) (1988). In addition, EPA must determine that a pesticide's labeling complies with the other requirements of FIFRA, including that the product is not "misbranded." *See id.* § 136(q); 40 C.F.R. § 152.112(f) (1991) (approval of registration). A pesticide is misbranded if, *inter alia*, "the label does not contain a warning or caution statement which may be necessary and if complied with . . . is adequate to protect health and the environment." 7 U.S.C. § 136(q)(1)(G). A pesticide also is misbranded if "the labeling accompanying it does not contain directions for use which . . . are adequate to protect health and the environment." *Id.* § 136(q)(1)(F).

*v. Zoecon Corp.*, 59 U.S.L.W. 3825 (U.S. May 29, 1991) (No. 90-1837); *see* 40 C.F.R. pt. 156 (1991).

In particular, EPA determines through regulation of labeling what warnings pesticide manufacturers should provide in connection with sale or use of their products. Pesticide labeling "must show clearly and prominently . . . [w]arning or precautionary statements as prescribed" by EPA. 40 C.F.R. § 156.10(a)(1)(vii). The warnings and precautionary statements specified by EPA encompass cancer, reproductive toxicity, and any other hazards to persons who use or may be exposed to a pesticide. *See id.* § 158.340 (1991). "Where a hazard exists to humans . . . precautionary statements are required indicating the particular hazard, the route(s) of exposure and the precautions to be taken to avoid accident, injury or damage." *Id.* § 156.10(h)(2)(i)(A). Furthermore, label directions "must be adequate to protect the public from . . . personal injury and to prevent unreasonable adverse effects." *Id.* § 156.10(i).

EPA is uniquely qualified to perform the task of regulating pesticide manufacturers' cautionary labeling. It has the national perspective, as well as the necessary scientific data, technical resources, expertise and experience, to determine which specific warnings are warranted, and which are not, for each pesticide product. By vesting EPA with comprehensive authority over labeling, Congress sought to "provide for a more finely tuned control of pesticides." S. Rep. No. 838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. at 3997. Thus, rather than limiting warnings to vague, generalized statements (such as those required by Proposition 65), EPA determines on the basis of each product's particular ingredients, toxicity and uses, what specific warnings, prohibitions, and precautionary measures are necessary to protect the health and safety of persons who purchase, use or may be exposed to the pesticide. EPA makes these product-by-product cautionary labeling determinations af-

ter reviewing numerous types of state-of-the-art scientific studies, which EPA requires pesticide manufacturers to conduct in accordance with stringent protocols. *See* 7 U.S.C. § 136a(c)(2)(A), (B); 40 C.F.R. pt. 158 (1991).

Through labeling, EPA seeks to prevent pesticide misuse. *See* 7 U.S.C. § 136j(a)(2)(G), making it unlawful to use a pesticide "in a manner inconsistent with its labeling." Misuse cannot be avoided unless label warnings are clear, read and followed. Proposition 65 point-of-sale warnings frustrate this goal by diverting attention away from, and undermining the integrity of, EPA-regulated labeling, thus diminishing its effectiveness in preventing misuse and protecting health.

### 2. *FIFRA's Express Prohibition Against State Labeling Requirements*

To achieve its objective of vesting EPA with absolute authority over pesticide manufacturers' precautionary labeling and warnings, Congress enacted FIFRA § 24(b), entitled "Uniformity," which expressly provides that no state shall "impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]." 7 U.S.C. § 136v(b). Congress intended this provision "to completely preempt State authority in regard to labeling." H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971); *see also* S. Rep. No. 838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. at 4021. Because "FIFRA place[s] the 'labeling' of pesticides within the singular province of the EPA," a state cannot second-guess or in any way supplement the cautionary labeling specified by EPA. *Jorling*, 874 F.2d at 117. As a result, "[u]nder FIFRA, the federal government—through the EPA—has the sole and exclusive right to regulate pesticide label[ing]." *Papas*, 926 F.2d at 1024.

While FIFRA does not prevent a state from restricting or even banning the use of an EPA-registered pesticide, section 24(b) makes it clear that labeling "fall[s] within an area that FIFRA's 'program' pre-empts." *Mortier*, 111 S. Ct. at 2487. The court of appeals recognized this same limitation on state authority over pesticides. *Allenby*, App. A at 9a ("We agree that additional labeling requirements would be unconstitutional under FIFRA."). Other than regulating labels, "states are left free to impose whatever restrictions they may wish." *Id.* at 7a; *see also Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158, 160 (10th Cir. 1992) ("A plain reading of the statute indicates an intent to maintain the traditional police powers of the states in the general grant of authority to 'regulate the sale or use' of pesticides, § 136v(a), and a more specific intent to occupy the field in labeling and packaging, § 136v(b)."); *Papas*, 926 F.2d at 1024 (alteration in original) (citations omitted) ("While states can regulate the sale or use of federally registered pesticides, no state can 'impose or continue in effect any requirements for labeling or packaging [of pesticides] in addition to or different from' those required by FIFRA."); *Jorling*, 874 F.2d at 118 (citation omitted) ("The states have joint control with the federal government in regulating use of pesticides, for the safety of its citizens and their environment with the exception of the EPA's exclusive supervision of labeling.").

Congress' objective in preempting state labeling requirements is to protect public health and safety, and also the environment, by imposing upon manufacturers the duty to distribute their products only with uniform cautionary labeling containing warnings specified solely by EPA. The court of appeals acknowledged that "Congress included the preemption provision in FIFRA to promote uniformity." *Allenby*, App. A at 7a; *see also Arkansas-Platte & Gulf Partnership*, 959 F.2d at 162 ("[T]he full purpose of [§ 24(b)] . . . is to ensure uniform labeling standards."); *Papas*, 926 F.2d at 1025 n.6

("This desire for uniformity is particularly evident in the regulation of pesticide warnings."). Nationally uniform cautionary labeling for each pesticide product fulfills FIFRA's fundamental purpose of protecting public health and the environment by promoting user comprehension and avoiding confusion over conflicting or inconsistent warnings. Thus, "FIFRA's prohibition of state labeling . . . has as 'its main focus . . . preserving the force of the information contained in the FIFRA label.'" *Jorling*, 874 F.2d at 119.

If each state had the authority to devise its own cautionary labeling (or point-of-sale warnings based on its own risk criteria) for the same pesticide product, Congress' goals would be frustrated. Not only would national uniformity be destroyed, but also the integrity of EPA's warning determinations reflected on each product's labeling would be seriously impaired by additional, different, inconsistent or conflicting state warning requirements. For example, if a state point-of-sale warning sign provided a cancer warning but the FIFRA label did not, the integrity of the FIFRA label would suffer because of its seeming inadequacy. Similarly, if a state warning sign used the phrase "Extreme Hazard to Eyes" in referring to a slight eye irritation hazard which the FIFRA label addressed by the phrase "Caution: Avoid Contact With Eyes," the credibility of the FIFRA precautionary statement would be impaired, and more serious warnings on the label might be ignored. Thus, without preemption of state labeling requirements, the very purpose of FIFRA and its labeling program—to protect public health and safety—would be jeopardized.

### B. The Court Deviated From Well-Established Principles of Preemption By Failing to Consider Whether Proposition 65 Frustrates Congress' Goals for Cautionary Labeling Under FIFRA

Regardless of whether Proposition 65 warning requirements fall literally within FIFRA's definition of labeling, they also are preempted if they "stand[] as an obstacle

to the accomplishment and execution of the full purposes and objectives of Congress." *Mortier*, 111 S. Ct. at 2482 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). "A state law—even if it has the same ultimate goal as a federal law—may stand as an obstacle to the full implementation of a federal law and therefore be preempted 'if it interferes with the methods by which the federal statute was designed to reach this goal.'" *Papas*, 926 F.2d at 1021-22 (quoting *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)); *see also Arkansas-Platte & Gulf Partnership*, 959 F.2d at 161.

The court of appeals flagrantly deviated from this long established principle of implied preemption by failing to consider whether Proposition 65 warning requirements frustrate the congressional goals underlying FIFRA's labeling program. Rather than taking Congress' objectives into account, the court erroneously determined that it "need not consider whether Proposition 65 frustrates congressional purpose." *Allenby*, App. A at 16a.

According to the court, such an analysis is unnecessary because of "the possibility of complying with both Proposition 65 and FIFRA." *Id.* This non-sequitur confuses two *separate* ways in which state and federal law may "actually conflict" for purposes of implied preemption:

> [P]re-emption may occur to the extent that state and federal law actually conflict. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), *or* when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

*Mortier*, 111 S. Ct. at 2482 (emphasis added). Thus, physical impossibility of dual compliance is one way that

a state law may conflict with a federal law, and frustration of congressional purpose is another.[8]

The court of appeals' explicit refusal to consider the question of whether Proposition 65 warning requirements frustrate FIFRA's purpose—an issue which Petitioner briefed extensively—renders the court's FIFRA preemption analysis flawed and incomplete, and given the potential ramifications of this error, is reason enough for this Court to grant a writ of certiorari.[9]

### C. The Court Failed to Recognize That the Undisputed Conflict Between Proposition 65 Warning Requirements and EPA-Mandated Pesticide Labeling Diminishes the Integrity of the Labeling and Compels Preemption

The district court record contains several examples of conflicting or inconsistent Proposition 65 and EPA warnings for specific pesticides. These conflicts arise because Proposition 65 mandates use of inflexible risk criteria, which trigger point-of-sale warning requirements. Those criteria differ substantially from EPA's "weight-of-the-evidence" approach to risk assessment. California and EPA separately utilize their different criteria to assess the risks associated with use of a particular pesticide,

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[8] Elsewhere in its opinion the court acknowledges that "state law may be preempted if it . . . stands as an obstacle to the achievement of federal objectives." *Allenby*, App. A at 4a (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).

[9] Although it may be physically possible for a pesticide manufacturer to comply with both FIFRA and Proposition 65, the court also failed to consider the fact that the manufacturer may have to obtain EPA's approval of point-of-sale signs in order to avoid committing an unlawful act under FIFRA since such signs fall within the definition of pesticide labeling. *See* 7 U.S.C. § 136j(a)(2)(A) (making it unlawful to use any labeling not approved by EPA under FIFRA); 49 Fed. Reg. 37,960, 37,972 (1984) (proposed definition of FIFRA labeling encompassing "any . . . printed or graphic matter . . . which accompanies the product at any time in distribution or sale").

and then independently require significantly different warning language to address the same risks. In some instances, the inflexible criteria of Proposition 65 require a warning even though EPA's more "finely tuned" risk assessment does not.

Petitioner submitted to the district court affidavits from former EPA pesiticide administrators explaining how the enforceability and integrity of FIFRA labeling for consumer pesticide products is impaired by Proposition 65. In particular, consumers will regard the FIFRA labeling for a pesticide which also has Proposition 65 warnings to be incomplete, confusing, or unreliable if the FIFRA labeling for the same product does not contain a cancer or reproductive toxicity warning, or if it contains differently worded warnings than those mandated by Proposition 65. Consumers will lose confidence in such FIFRA labeling despite the fact that EPA has carefully assessed the risks of the pesticide and determined what warnings, if any, are warranted.

This problem will be compounded if, as a result of the Ninth Circuit's decision, California ever were to expand Proposition 65 to require point-of-sale warnings for other types of hazards already regulated by FIFRA labeling. The same would be true if other States enact their own versions of Proposition 65 utilizing their own risk criteria and warnings, even if they conflict with EPA's and other States' risk criteria and warning requirements. The overall result will be to defeat the very purpose of FIFRA's labeling program. This is because consumers will ignore or give short shrift to FIFRA label warnings (including warnings and precautions not covered by Proposition 65 or other States' similar schemes) since the federal labeling program depends completely on reading and following the label.

The court's implied preemption analysis fails to take into account the deleterious effects that Proposition 65 warning requirements have on EPA's FIFRA labeling

program. Nor does the court's opinion recognize that, by pressuring pesticide manufacturers to seek label changes to conform with state-imposed warning requirements, Proposition 65 will have a potentially devastating effect on EPA's maintenance of nationally uniform label warnings. *Allenby*, App. A at 16a. "'[I]n implied preemption analysis it is possible to infer preemptive intent solely from effects': even if statutory language or legislative history is unclear, federal law preempts state law if 'the ordinary application of the two laws creates a conflict.'" *Papas*, 926 F.2d at 1019 (quoting *Taylor v. General Motors Corp.*, 875 F.2d 816, 826 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990)). Therefore, regardless of whether Proposition 65 warnings are "labeling" within the meaning of FIFRA, they are preempted because they will interfere with the credibility and uniformity of FIFRA cautionary labeling, which Congress intended to protect public health and safety.

## III. THE NINTH CIRCUIT'S ERRONEOUS INTERPRETATION OF PESTICIDE LABELING CONFLICTS WITH PREVIOUS OPINIONS OF THIS COURT AND THE SECOND CIRCUIT

Proposition 65 warning requirements not only are impliedly preempted by FIFRA since they interfere with Congress' goal of nationally uniform cautionary labeling regulated solely by EPA, but also are expressly preempted by FIFRA § 24(b) since they are "requirements for labeling . . . in addition to or different from those required under [FIFRA]." 7 U.S.C. § 136v(b). The court of appeals agreed that "additional labeling requirements would be unconstitutional under FIFRA," but disagreed "that the warning requirements of Proposition 65 constitute additional labeling." *Allenby*, App. A at 9a. By holding that Proposition 65 warnings are not labeling within the meaning of FIFRA, the Ninth Circuit's opinion directly conflicts with the Supreme Court's opinion in *Kordel*, 335 U.S. 345, and the Second Circuit's opinion in *Jorling*, 874 F.2d 115.

In *Kordel*, the Supreme Court interpreted the Federal Food, Drug, and Cosmetic Act's definition of labeling, which is virtually identical to FIFRA's.[10] The Court held that written, printed, or graphic information which is used in connection with the sale of a product, and which "supplements or explains" the product or its label, should be construed as "accompanying" the product, and hence as labeling. 335 U.S. at 350. Further, "[n]o physical attachment one to the other is necessary. *It is the textual relationship that is significant.*" *Id.* (emphasis added); *see also United States v. 47 Bottles, More or Less*, 320 F.2d 564, 568 (3d Cir.) (explanatory leaflets sent out two months prior to shipment of product were labeling), *cert. denied sub nom.* 375 U.S. 953 (1963).

The opinion below conflicts with this Court's holding in *Kordel* regarding the meaning of "accompanying." Proposition 65 point-of-sale warnings are "written, printed, or graphic matter . . . accompanying" a pesticide, and therefore are pesticide labeling, because such warnings supplement or explain, and have a textual relationship with, the pesticide and its EPA-regulated label. 7 U.S.C. § 136(p)(2) (defining pesticide labeling as "all labels and all other written, printed, or graphic matter . . . accompanying the pesticide . . . at any time"); Cal. Code Regs. tit. 22, § 12601(d)(1)(A) (defining a Proposition 65 point-of-sale warning sign as "a presentation of written, printed, or graphic matter"). The court of appeals failed to recognize this relationship, as indicated by its inapt attempt to compare Proposition 65 warnings to "price stickers affixed to shelves" and "sheets indicat-

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[10] The statutory provision involved in *Kordel* defined labeling as "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." *Kordel*, 335 U.S. at 348 (footnote omitted) (quoting section 201(m) of the Federal Food, Drug, and Cosmetic Act); *see FIFRA* § 2(p)(2), 7 U.S.C. § 136(p)(2).

ing that a product is on sale." *Allenby*, App. A at 10a.[11] The court also attempted to distinguish *Kordel* on its facts by noting that the labeling in that case was aimed at the ultimate user of the product. Typically, however, consumers targeted by Proposition 65 are the ultimate users of the household products which they purchase. Thus, there is no basis for distinguishing *Kordel*, whose broad view of product labeling has been the law for decades.

The court's opinion conflicts with the Second Circuit's opinion in *Jorling* as well. Consistent with the Supreme Court's opinion in *Kordel*, the Second Circuit explained that FIFRA "'[l]abeling' is better understood by its relationship, rather than its proximity, to the product." *Jorling*, 874 F.2d at 119. The court's rationale below, that Proposition 65 warnings are not labeling because "[p]oint-of-sale signs are not attached to the immediate container of a product and will not accompany the product during the period of use," is contrary to *Kordel* and *Jorling* because it focuses on the physical proximity of the Proposition 65 warning to the product, rather than on the warning's relationship to the product. *Allenby*, App. A at 11a.

The court of appeals also misunderstood the nature of the state law at issue in *Jorling*. In contrast to Proposition 65 warning requirements, which are imposed upon pesticide manufacturers, *Jorling* involved state regulations requiring commercial pesticide *applicators* (i.e., users) to provide certain public notifications about their commercial pesticide application activities. There is no suggestion in *Jorling* that pesticide manufacturers, which are required to distribute their products with EPA-mandated cautionary labeling, can or should be subject to additional labeling requirements imposed by state law in violation of FIFRA § 24(b).

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[11] In so doing, the court unjustifiably and inappropriately diminished the importance of cautionary labeling, which is at the heart of FIFRA's pesticide program.

## IV. THE NINTH CIRCUIT'S DECISION ALSO UNDERMINES FEDERAL WARNING DETERMINATIONS FOR CONSUMER PRODUCTS CONTAINING HAZARDOUS SUBSTANCES

The court of appeals found that "[t]he preemption issues arising under FHSA are identical to those arising under FIFRA." *Allenby*, App. A at 8a. Further, the court agreed that "FHSA [§ 18(b)] expressly preempts all state mandated precautionary labeling that is not identical to that required by the Act." *Id.* at 16a; *see* 15 U.S.C. § 1261 note (b)(1). The court again focused, however, on whether Proposition 65 warnings are labeling, and as in the case of FIFRA, reached the wrong conclusion. Furthermore, the court failed to recognize that even if Proposition 65 warning requirements are not strictly labeling within the meaning of FHSA, they nevertheless are preempted because they obstruct Congress' goals.

### A. Congress Expressly Preempted State Requirements for Cautionary Labeling of Hazardous Substances By Establishing Through FHSA Nationally Uniform Cautionary Labeling for Each Consumer Product

FHSA § 18(b)(1)(A) provides that "no State . . . may establish or continue in effect a cautionary labeling requirement applicable to [a hazardous] substance . . . and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under [FHSA] section 2(p) or 3(b)." 15 U.S.C. § 1261 note (b)(1).[12] "Under the FHSA . . . 'all accompanying literature where

[12] If a state wishes to impose different cautionary labeling requirements, it must petition CPSC for an exemption from the "identicality" requirement. 15 U.S.C. § 1261 note (b)(3). In determining whether to grant such an exemption, CPSC must consider "the need for a national, uniform requirement under [FHSA] for such substance." *Id.* § 1261 note (b)(3)(A). Not surprisingly, California has sought no such exemption.

there are directions for use, written or otherwise' is defined as cautionary labeling," and is subject to this express preemption provision. *Allenby*, App. A at 16a-17a (quoting FHSA § 2(n), 15 U.S.C. § 1261(n)(2)). Moreover, as the court of appeals explained, CPSC regulations define "accompanying literature" as "[a]ny *placard*, pamphlet, booklet, book, *sign*, or other written, printed, or graphic matter or visual device that provides directions for use, written or otherwise, and that is used in connection with the *display*, *sale*, demonstration, or *merchandising* of a hazardous substance intended for . . . use in the household or by children." *Allenby*, App. A at 17a (alterations in original) (emphasis added) (citing 16 C.F.R. § 1500.3(c)(9)).

Congress expressly preempted state requirements for cautionary labeling of consumer products containing hazardous substances subject to FHSA in order to protect public health and safety through a system of nationally uniform cautionary labeling regulated solely by CPSC. In enacting FHSA in 1960, Congress declared that FHSA would "provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances." H.R. Rep. No. 1861, 86th Cong., 2d Sess. (1960), *reprinted in* 1960 U.S.C.C.A.N. at 2833. Congress explained that

> *nationwide uniformity* in the labeling of potentially hazardous chemicals *would be advantageous to everybody*. Such a labeling program would facilitate the education of the public in the cautionary use of these products.
>
> . . . In the absence of a Federal law, there is a possibility that diverse labeling regulations will be adopted by the States, leading to a *multiplicity of requirements and creating unnecessary confusion in labeling, to the detriment of the public.*

*Id.* at 2835 (emphasis added).

To achieve nationwide uniformity in cautionary labeling, Congress amended FHSA in 1966 by adding a pre-

emption provision. Congress found that "[i]t is *impractical, unnecessary, and undesirable for each such product to be labeled specially* for those States and cities which have developed *their own standards for requiring warnings and their own special forms of warnings* over the years during which there was no Federal law." H.R. Rep. No. 2166, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. at 4097 (emphasis added); *see also Lowery*, 452 F.2d at 437. The current version of FHSA's preemption provision, as was the original, is "limited" only in the sense that the States are not precluded from imposing warning requirements "if the hazard involved is of a kind not dealt with by the Federal act." H.R. Rep. No. 2166, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. at 4097. Cancer and reproductive toxicity, the hazards covered by Proposition 65, are encompassed by FHSA cautionary labeling requirements, and therefore, the preemption provision applies to Proposition 65 warnings. *See* FHSA §§ 2(p) and 3(b), 15 U.S.C. §§ 1261(p) and 1262(b).

### B. The Court Erroneously Concluded That Proposition 65 Point-of-Sale Warnings Do Not Frustrate Congress' Goals for Cautionary Labeling Under FHSA

The court of appeals misconstrued the purposes of FHSA's preemption provision in concluding that "no congressional purpose [of FHSA] [is] frustrated by Proposition 65." *Allenby*, App. A at 18a. There is ample legislative history underscoring Congress' intent to protect public health and safety by avoiding consumer confusion over a multiplicity of conflicting or inconsistent product warnings. "It is the states' and cities' 'own special forms of warnings' which the Federal Hazardous Substances Act 'limited preemption amendment' is directed against." *Lowery*, 452 F.2d at 443 (Oakes, J., dissenting) (quoting H.R. Rep. No. 2166, 89th Cong., 2d Sess. (1966)).

Nevertheless, the court below viewed preemption merely as a compromise to "ease the burden of compliance for chemical product manufacturers by relieving them from the burden of complying with fifty-one separate regulatory schemes." *Allenby*, App. A at 19a. While the marketing burden certainly is one goal of the FHSA preemption provision, it is not the only or even primary objective, especially when viewed in the context of the entire Act; Congress intended foremost to ensure "better labeling of poisonous and hazardous materials that are brought into the home." H.R. Rep. No. 1861, 86th Cong., 2d Sess. (1960), *reprinted in* 1960 U.S.C.C.A.N. at 2833-34.

As in the case of FIFRA, the court failed to consider that Proposition 65 warnings, which conflict or are inconsistent with federally required cautionary labeling, undermine the integrity of the warnings on the FHSA labeling. They defeat the fundamental purpose of FHSA, which is "to require precautionary labeling which is meaningful and will be observed by the user." S. Rep. No. 1158, 86th Cong., 2d Sess. 11 (1960). By diverting consumer attention away from the warning on the product label, Proposition 65 unravels the congressionally woven fabric of FHSA.

## V. THE NINTH CIRCUIT FAILED EVEN TO CONSIDER CPSC'S INTERPRETATION OF FHSA, MUCH LESS GIVE IT THE DEFERENCE WHICH THIS COURT REPEATEDLY HAS HELD SHOULD BE AFFORDED TO AN AGENCY'S INTERPRETATION OF ITS OWN STATUTE

The court of appeals based its conclusion that Proposition 65 point-of-sale warnings are not FHSA labeling primarily on its erroneous "common sense" finding that they are not "directions for use." *Allenby*, App. A at 18a. The court's opinion, however, never mentions the formal Advisory Opinion rendered by CPSC's General Counsel on this very question of statutory construction. CPSC Ad-

visory Op. No. 312.[13] That Advisory Opinion specifically determines that a Proposition 65 warning is an implied direction for use, and hence, labeling within the meaning of FHSA, because "it conveys the information that, in using the product, steps should be taken to minimize or eliminate exposure." App. D at 42a.

The "principle of deference to administrative interpretations" has been consistently followed by the Supreme Court, but was totally ignored by the court of appeals in this case. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). It is well settled that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* (footnote omitted). If a court

> determines Congress has not directly addressed the precise question at issue, *the court does not simply impose its own construction on the statute*, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, *the question for the court is whether the agency's answer is based on a permissible construction of the statute.*

*Id.* at 843 (emphasis added) (footnote omitted). Because the court of appeals failed to address the question of whether CPSC's interpretation is a permissible construction of its own statute, the court's FHSA preemption analysis is hopelessly flawed, and this Court should grant review.

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[13] By regulation, CPSC's General Counsel has responsibility to provide "written advisory opinions interpreting the acts the Commission administers." 16 C.F.R. § 1000.7(a) (1992). Petitioner requested the court of appeals to take judicial notice of CPSC Advisory Opinion No. 312. By Order dated March 27, 1991, the motions panel deferred the request for judicial notice to the merits panel and permitted Petitioner to address the Advisory Opinion in its briefs, subject to a possible later order to strike. To the best of Petitioner's knowledge, the merits panel took no action regarding the request to take judicial notice.

The court of appeals also erroneously found that "Proposition 65 warnings are not necessarily nonidentical to the warnings required under FHSA." *Allenby*, App. A at 18a. While FHSA does allow some discretion on wording, the court's expansive interpretation of "identical" would authorize fifty different sets of state warnings for each hazard regulated under FHSA. This danger is underscored by the court's suggestion that the phrase " 'Warning, this product contains materials known to the *State of California* to cause cancer' " would comply with both FHSA and Proposition 65. *Id.* (emphasis added). While that California-specific phrase might work for a product sold in California, it would create confusion and uncertainty, and impair the credibility of the entire FHSA label, for consumers who purchase the identically labeled product in any other State. Incorporating *even one* state-specific warning onto the label of a consumer product—and under the court's scenario, there potentially could be fifty state-specific warnings all crammed onto the same label—would obstruct the national uniformity and integrity of label warnings that Congress intended FHSA and its preemption provision to achieve.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 90-16485

D.C. No. CV-90-00211-FMS OPINION

CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION, INC.,
*Plaintiff-Appellant,*

v.

CLIFFORD L. ALLENBY; JOHN K. VAN DE KAMP, Esq.,
*Defendants-Appellees.*

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Appeal from the United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding

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Argued and Submitted
December 12, 1991—San Francisco, California

Filed March 11, 1992

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Before: Procter Hug, Jr., Cynthia Holcomb Hall and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Hug

---

Charles A. O'Connor, III, McKenna & Cuneo, Washington, D.C., for the plaintiff-appellant.

Edward G. Weil and Clifford Rechtschaffen, Deputy Attorneys General, Oakland, California, for the defendants-appellees.

OPINION

HUG, Circuit Judge:

Chemical Specialties Manufacturers Association, Inc. ("CSMA") filed this action below seeking a declaratory judgment that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1988), and the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. §§ 1261-1277 (1988), preempt Proposition 65 warning requirements. The State of California filed an opposition. The district court found that no genuine issues of material fact existed, and entered a Memorandum-Decision and Order on September 11, 1990, granting the State of California's motion for summary judgment. This appeal followed and we affirm.

## I. *FACTS*

CSMA is a national trade association of insecticide, disinfectant, and antimicrobial product manufacturers who sell their products to consumer, institutional, and industrial users. Many of the products manufactured by CSMA members are regulated under either FIFRA or FHSA. Both FIFRA and FHSA have express preemption provisions that prohibit certain types of state regulation, including labeling requirements on products regulated under the Acts.

The California Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65") requires California to list substances that it determines to be carcinogenic or reproductively toxic. Twelve months after a sub-

stance has been listed by the state, the manufacturers of products containing the listed substances must provide adequate warnings to the consuming public that their products pose a health risk. CSMA contends that the adequate warning requirements of Proposition 65, as applied to products regulated under FIFRA and FHSA, are preempted by these Acts.

## II. *DISCUSSION*

### A. *Standard of Review*

A decision to grant or deny a summary judgment motion is reviewed *denovo*. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990); *State Farm Fire & Cas. Co., Inc. v. Martin*, 872 F.2d 319, 320 (9th Cir. 1989).

Since this is a facial challenge to Proposition 65, CSMA "must establish that no set of circumstances exists under which the Act would be valid. The fact that the [] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . ." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 579-80 (1987) (party making a facial challenge to state regulations based on preemption required to demonstrate "that there is no possible set of conditions [the State] could place on its permit that would not conflict with federal law—that any state permit requirement is *per se* preempted.").

There is a presumption against finding that state legislation is preempted by an act of Congress. Preemption analysis starts with the presumption that the traditional police powers of states are not displaced by federal law unless displacement was the "clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). "[F]ederal regulation of a field of commerce

should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963). We have noted two practical reasons for this presumption. First, Congress has the power to make preemption clear in the first instance. Second, if the court erroneously finds preemption, the State can do nothing about it, while if the court errs in the other direction, Congress can correct the problem. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 488 (9th Cir. 1984), *cert. denied*, 471 U.S. 1140 (1985).

In particular, "regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 707, 719 (1985). Consequently, courts should be especially unlikely to find preemption of state laws in these areas. *See id.* Preemption analysis is governed by a three-part test. First, Congress or a federal agency may expressly preclude all state legislation in a particular field. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, an intent to displace state law may be inferred from the structure and purpose of the federal statute. *Id.* Finally, state law may be preempted if it conflicts with federal law or stands as an obstacle to the achievement of federal objectives. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

To find that Proposition 65 is preempted under FIFRA or FHSA, this court must determine that all possible consumer product warnings that would satisfy Proposition 65 conflict with provisions of the federal statutes. This case turns on this standard. The focus of the decision below was whether point-of-sale warnings constituted "labeling" under FIFRA or "directions for use" under FHSA. The court answered both questions in the negative and granted summary judgment for the state. Since

we agree with the district court that point-of-sale warnings are neither labels nor directions for use, we reject CSMA's preemption arguments. No other Proposition 65 warning devices need be considered since point-of-sale signs are not preempted under either FIFRA or FHSA.

B. *The Statutory Background*

1. *Proposition 65*

Proposition 65 provides that "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual." Cal. Health & Safety Code § 25249.6 (West 1991). To satisfy this obligation, the statute explains that:

> "Warning" within the meaning of Section 25249.6 need not be provided separately to each exposed individual and may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, placing notices in public news media, and the like, provided that the warning accomplished is clear and reasonable.

*Id.* at § 25249.11(f). Proposition 65 therefore provides several methods of compliance: (1) labeling on consumer products; (2) posting notices; (3) placing notices in the news media; (4) any other method providing clear and reasonable warning of the hazard. These methods are further expanded in the safe harbor regulations promulgated by the California Health and Welfare Agency. The safe harbor regulations designate the following language as sufficient to satisfy Proposition 65: "Warning: This product contains a chemical known to the State of California to cause cancer." Cal. Code Regs. tit. 22, § 12601 (b)(4)(A) (1991). A retail outlet can comply with Proposition 65 by posting a sign in a visible place specify-

ing the products that are known to the state to cause cancer or that are reproductively toxic. Cal. Code Regs. tit. 22, § 12601(b)(3) (1991).

2. *FIFRA*

FIFRA requires the Environmental Protection Agency ("EPA") to register a pesticide before the pesticide can be sold or used. 7 U.S.C. § 136a(a) (1988). The statute and supporting regulations contain detailed requirements for registration. Basically, the requirements are that a pesticide may not be sold (with certain exceptions) unless the EPA first determines that the product's labeling contains warnings and directions for use that are "adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment." 40 C.F.R. §§ 156.10(i)(1)(i), 156.10(h) (1991); *see also* 40 C.F.R. §§ 156.10(a)(1)(vii), 156.10 (a)(1)(viii) (1991); 7 U.S.C. § 136a(5)(B). Once the EPA has registered a pesticide and approved its label, the manufacturer may not change the label without the EPA's prior approval.

FIFRA's preemption clause provides as follows:

> § 136v Authority of States
>
> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v (1988). So long as additional labeling is not required, FIFRA expressly authorizes state pesticide

regulation. Other than regulating labels, states are left free to impose whatever restrictions they may wish. Consequently, a state could prohibit the sale of a pesticide within its borders even though it could not require the manufacturer of the pesticide to change the label.

Both parties to this appeal agree that Congress included the preemption provision in FIFRA to promote uniformity and ease distribution practices for chemical product manufacturers. CSMA asserts that the uniformity objective is founded on the belief that consumers traveling between states would be confused by different labels on the same products. In support of this argument, CSMA quotes the following comment from Congressman Sisk at the congressional hearings on the 1972 FIFRA amendments:

> As I understand, Mr. Ackerly [CSMA counsel], you desire what in essence, would be Federal preemption as to labeling or as to standards on household items in connection with labeling and of the word "Poison" in certain instances. I am inclined to agree with you because I do not see how else we can really inform people who do not intend to stay in the same place, and will be reading labels in other States.

Hearings Before Comm. on Agriculture, House of Representatives, 92d Cong., 1st Sess. 287 (Mar. 8, 1971). According to CSMA, the importance of a uniform labeling system under FIFRA is rooted in a concern for clarity so that consumers can easily recognize warning labels no matter which state they enter. CSMA then suggests that the point-of-sale signs required under Proposition 65 defeat this congressional purpose by requiring additional labeling that creates consumer confusion.

CSMA's argument, however, is circular. The issue before us is whether Proposition 65 requires additional product "labeling." Certainly, if we conclude that point-of-sale signs are additional labels, then those signs are

preempted by FIFRA. Citing legislative history that explains why additional labeling is preempted, however, does not address the issue of what constitutes additional labeling. The labels attached to the chemical containers remain unchanged by Proposition 65.

3. *FHSA*

FHSA requires labeling of certain consumer products intended for use in the household or by children. The central requirement of the Act is that manufacturers of hazardous products provide cautionary labels clearly indicating the hazards and providing consumers with directions for use. The amendments to the Act contain a limited preemption provision which provides as follows:

> [I]f a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [15 U.S.C. §§ 1261(p) or 1262 (b)] designed to protect against a risk of illness or injury associated with the substance, no State . . . may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under 2(p) or 3(b).

15 U.S.C. § 1261 note (b)(1)(A) (1988) (Effect Upon Federal and State Law, § (b)(1)(A), Pub. L. 94-284 § 17(a)). The preemption issues arising under FHSA are identical to those arising under FIFRA. We must similarly determine whether the point-of-sale signs that satisfy Proposition 65 fall within the preemption clause of FHSA.

C. *Whether Proposition 65 Warnings Constitute a State Requirement for Labeling that Is Preempted under FIFRA.*

1. *Express Preemption under FIFRA.*

CSMA points out that FIFRA expressly prohibits states from imposing labeling requirements that differ from those registered with EPA. CSMA then argues that the warnings required under Proposition 65 fall squarely with FIFRA's defintion of "labeling." Consequently, CSMA asserts that Proposition 65 is expressly preempted by FIFRA. We agree that additional labeling requirements would be unconstitutional under FIFRA. However, we disagree that the warning requirements of Proposition 65 constitute additional labeling.

FIFRA defines the term labeling as follows:

> § 136(p) Label and labeling
>
> (1) Label
>
> The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.
>
> (2) Labeling
>
> The term "labeling" means all labels and all other written, printed, or graphic matter—
>
> (A) accompanying the pesticide or device at any time; or
>
> (B) to which reference is made on the label or in literature accompanying the pesticide or device. . . .

7 U.S.C. § 136(p)(2) (1988). Under this definition, Proposition 65 warnings clearly are not "labels" within the meaning of paragraph (1), since point-of-sale warnings are neither written on the pesticide nor attached to it.

The question remains, however, whether these warnings constitute "labeling" under paragraph (2) above.

CSMA argues that the point-of-sale signs constitute labeling because they are written materials that accompany the pesticide at the point of sale. It claims that since FIFRA defines labeling as "all other written, printed, or graphic matter . . . accompanying the pesticide . . . at any time," Proposition 65's warning methods all fall within this broad definition. This interpretation, however, cannot be correct.

FIFRA's definition of labeling cannot encompass every type of written material accompanying the pesticide at any time. If this were true, then price stickers affixed to shelves, sheets indicating that a product is on sale, and even the logo on the exterminator's hat would all constitute impermissible labeling.

The leading case that interprets the term "labeling" as defined by FIFRA is *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115 (2nd Cir. 1989). In *Jorling*, the Second Circuit addressed the question of whether a New York law, designed to assure public awareness of the presence of poisonous chemicals dispensed on properties, was preempted by FIFRA. Although CSMA attempts to distinguish *Jorling*, that case is nearly identical to the one now before us.

New York passed legislation that set forth notification requirements "intended to alert the public to the impending use of poisonous chemicals and to disseminate information to those who may be exposed." *Jorling*, 874 F.2d at 116. The New York law at issue required all commercial pesticide applicators to give the purchaser of the service a cover sheet providing warnings and safety information, and to post signs on the perimeter of the affected property warning people not to enter the premises for a specified number of hours. *Id.*

The *Jorling* Court interpreted the same language from FIFRA as we must now interpret, and it concluded that the posted signs did not constitute labeling. Consequently, the New York notification law was not preempted. The Court stated:

> Because the notification materials are present in some spatial and temporal proximity to the applied pesticide, it is asserted they "accompany" it. But this definition is rather strained. *"Labeling" is better understood by its relationship, rather than its proximity, to the product.*
>
> . . . FIFRA "labeling" is designed to be read and followed by the end user. *Generally, it is conceived as being attached to the immediate container of the product in such a way that it can be expected to remain affixed during the period of use.*

*Jorling*, 874 F.2d at 119 (emphasis added).

CSMA cites *Jorling* for the proposition that FIFRA preempts state laws that require manufacturers to provide supplemental product warning information to the end user. Yet, *Jorling* cannot possibly stand for this proposition. The issue in *Jorling* was whether the posting of signs constituted labeling, and the court held that it did not. *Id.* The court examined the common usage of the term "labeling" and concluded that it did not apply to the posted notices required under the New York State law at issue in that case. Similarly, we conclude that the term "labeling" does not apply to the point-of-sale signs required under Proposition 65. Point-of-sale signs are not attached to the immediate container of a product and will not accompany the product during the period of use.

CSMA also cites *Kordel v. United States*, 335 U.S. 345 (1948), in support of its claim that point-of-sale signs are labels. In *Kordel*, the Court held that supplemental literature provided by a drug manufacturer constituted labeling under the Federal Food, Drug and Cosmetic Act

because it advised end users on how to administer a drug. *Kordel*, however, is distinguishable from the case at hand. First, the written materials in *Kordel* were aimed at the ultimate user of the drug, not the purchaser that is targeted by Proposition 65. 335 U.S. at 348. Second, the materials at issue in *Kordel* contained directions for use, which the EPA had clearly stated must be on the label. *Id.* Finally, the context of the manufacturer's mailings in that case suggested that the manufacturer was attempting to circumvent the Act rather than supplement it. *Id.* at 350. We find no such factors present in the instant case. Consequently, *Kordel* does not apply. FIFRA does not expressly preempt Proposition 65 since point-of-sale signs do not constitute labeling under the Act.

2. *Implied Preemption under FIFRA.*

CSMA argues that Proposition 65 is impliedly preempted by FIFRA for two reasons. First, CSMA asserts that manufacturers must seek EPA approval of new labels, when Proposition 65 requires additional warnings for the pesticide, to avoid the risk of misbranding products. The argument essentially is that by supplementing the EPA-approved label to provide an additional warning, the manufacturer implicitly acknowledges that the EPA-approved label is incomplete, thereby subjecting the manufacturer to an EPA sanction for misbranding its products. Second, CSMA argues that when Proposition 65 requires additional warnings, the manufacturers must change their labels to avoid product liability suits. Although the first of these arguments is weak, the second is not.

FIFRA provides that a pesticide is misbranded if the warning on the label is insufficient to protect the public health. 7 U.S.C. § 136(q)(1)(G) (1988). As manufacturers uncover additional information about the health risks of their products, they must bring this information to the attention of the EPA and add this information to

their product labels. CSMA argues that manufacturers who are required by Proposition 65 to post point-of-sale notices become liable under FIFRA for misbranding their products. CSMA has cited no cases in support of this argument. It seems implausible that the EPA would prosecute a company for, in essence, complying with Proposition 65.

Manufacturers only become liable for misbranding when their labels are insufficient, not for posting additional warning signs as dictated by state law. If manufacturer awareness of new product risks is triggered by the State of California's list of chemicals known to cause cancer or reproductive toxicity, then the list of chemicals merely uncovers hazards that should have been uncovered by the manufacturers. The more likely scenario is that the hazards of a chemical are already known to both the manufacturer and the EPA, but that neither believes that cancer or reproductive toxicity is a likely danger. In this scenario, it seems contradictory to assert that the EPA will prosecute a company for satisfying the standards developed by the EPA but deemed insufficient by the State of California.

CSMA's second argument in support of implied preemption is that manufacturers would be obligated to change their labels when California requires additional point-of-sale warnings. Otherwise, the manufacturers would be at risk of product liability suits for inadequate warning. This argument has merit. The issue is whether manufacturers can incur tort liability for inadequate warnings on products regulated under FIFRA. If they can, then perhaps plaintiffs could argue that the Proposition 65 warnings reveal the inadequacies of the EPA approved labels. Proposition 65 does have an express provision, however, that the warnings shall not be construed to establish exposure levels for any other regulatory purpose. Cal. Code Regs. tit. 22, §§ 12701(d), 12801(e) (1991).

Proposition 65 neither expressly nor impliedly requires additional product labeling. Consequently, manufacturers need not feel pressure to apply for EPA approval of label changes so that they can comply with Proposition 65. Point-of-sale signs are sufficient to satisfy the California requirements. Whether these signs create legitimate fears of product liability suits in other states for failing to warn of the dangers listed on the point-of-sale warnings in California, however, merits discussion. CSMA makes a good point when it claims that no manufacturer wants to face a jury in a defective labeling case arguing that a cancer, reproductive or developmental hazard warning not given in the forum state was given in California only to comply with Proposition 65. The argument, however, fails for two reasons. First, it is not clear whether plaintiffs can sue for defective labeling of products regulated by FIFRA. Second, even if they could, a point-of-sale warning required by Proposition 65 is not an admission of liability.

The case law is split on whether plaintiffs can sue manufacturers for defective labeling of products regulated by FIFRA. The argument against product liability suits for inadequate labeling is strong. State tort liability holds manufacturers liable for failing to include an adequate warning on the product's *label.* Since FIFRA expressly preempts additional state *labeling* requirements, the tort suits could circumvent the preemption clause by effectively requiring additional labeling to avoid tort liability even though the states do not expressly require the additional labeling.

In *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987), the court did not allow a product liability suit for inadequate labeling of a product regulated by FIFRA. The court stated:

> Where the federal government has preempted any state regulation, there can be no recovery in tort. Allowing recovery under state tort law where Con-

> gress has preempted state law would effectively authorize the state to do through the back door exactly what it cannot through the front. FIFRA expressly provides that no state may impose "*any* requirement for labeling or packaging *in addition to or different from* those required under this Act." 7 U.S.C. § 136v(b).

681 F. Supp. at 407. Other district courts finding that FIFRA preempts state tort claims for inadequate labeling include *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799 (M.D. Fla. 1989), and *Fisher v. Chevron Chem. Co.* 716 F. Supp. 1283 (W.D. Mo. 1989).

An equal weight of authority, however, suggests that product liability claims for inadequate warnings are not preempted by FIFRA. Cases finding no preemption include *Arkansas Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 748 F. Supp. 1474 (D. Colo. 1990); *Stewart v. Ortho Consumer Products*, 1990 WL 36129 (E.D. La. 1990); *Cox v. Velsicol Chem. Corp.*, 704 F. Supp. 85 (E.D. Pa. 1989); *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195 (N.D. Ill. 1988).

Only two federal appellate courts have addressed the issue and these two cases are split as well. In *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984), the D.C. Circuit held that state common law tort suits were not preempted by FIFRA. However, in *Papas v. The Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *petition for cert. filed sub nom.*, 60 U.S.L.W. 3016, 3053 (U.S. May 29, 1991) (No. 90-1837), the Eleventh Circuit held that state tort suits were preempted. The great split in authority is important to illustrate that even when the consequences of state action clearly pressure companies to change their FIFRA labels, there is no consensus on whether the state action is preempted. In the instant case, however, there would be no need for companies to change their labels to comply with Proposition 65, unlike the need to change labels in order

to avoid state tort liability. Whether or not product liability suits for defective labeling should be permitted, we do not believe Proposition 65 in any way pressures manufacturers to affix additional labels to the containers of their products. Consequently, the argument for implied preemption is not persuasive.

3. *Frustration of Congressional Purpose.*

For purposes of preemption analysis, CSMA must show a physical impossibility of complying with both Proposition 65 and FIFRA before succeeding on a claim that Proposition 65 is preempted on this theory. The Supreme Court has stated that the proper approach is to "reconcile the operation of both statutory schemes with one another rather than holding [that one has been] completely ousted." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 183 (1978) (quotation marks omitted). *See also Florida Lime*, 373 U.S. at 152; *California Coastal Comm'n*, 480 U.S. at 581. Since CSMA has acknowledged the possibility of complying with both Proposition 65 and FIFRA, we need not consider whether Proposition 65 frustrates congressional purpose.

D. *Whether Proposition 65 Warnings Constitute a State Requirement for Labeling that is Preempted under FHSA.*

CSMA argues that FHSA § 17(b) expressly preempts all state mandated precautionary labeling that is not identical to that required by the Act. This is correct. FHSA § 17(b)(1)(A) provides as follows:

> [N]o State . . . may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical . . . .

15 U.S.C. § 1261 note (1988) (Effect Upon Federal and State Law, § (b)(1)(A), Pub. L. 94-284 § 17(a)). Under

the FHSA, however, "all accompanying literature where there are directions for use, written or otherwise" is defined as cautionary labeling, 15 U.S.C. § 1261(n)(2) (1988). Accompanying literature is defined as follows:

> [A]ny placard, pamphlet, booklet, book, sign, or other written, printed, or graphic matter or visual device that provides directions for use, written or otherwise, and that is used in connection with the display, sale, demonstration, or merchandising of a hazardous substance intended for . . . use in the household or by children.

16 C.F.R. § 1500.3(c)(9) (1991). CSMA's contention that Proposition 65 point-of-sale warnings fall within this definition is implausible for two reasons. First, Proposition 65 warnings are not "directions for use," and second, the warnings are not necessarily nonidentical.

CSMA creates several strained analogies to make the argument that Proposition 65 warnings are directions for use, and therefore constitute labeling under FHSA. For example, CSMA claims that Proposition 65 warnings contain both a signal word and a statement of principle hazard: Warning, this product contains a chemical known to the State of California to cause cancer. The argument is founded upon the misconception that since this warning impliedly directs the consumer to handle the product so as to avoid or minimize direct exposure, the warning is a direction for use. Basically, CSMA argues that since Proposition 65 warnings of cancer or reproductive toxicity convey information about the product's dangers and the need to use the product cautiously, they are directions for use. We do not believe Congress intended such a broad reading of that term.

During the trial below, Judge Smith illustrated the nonsensical reading CSMA gives to the term "directions for use" when she noted during oral argument that a sign stating "this product may cause birth defects:"

> [D]oesn't tell you whether it's going to cause defects if you pour it on your feet, or if you drink it, or if you poke it in your ear, it just says that it may cause birth defects. How is that a direction for use?

Such a warning cannot, by definition, be a direction for use. *See Burch v. Amsterdam Corp.*, 366 A.2d 1079, 1086 (D.C. 1976); *Jorling*, 874 F.2d at 119.

As the State points out, Congress more likely had a common sense definition of the term "directions for use," such as how much of a detergent to use, or how long a paint solvent should be mixed. CSMA's argument that Proposition 65 warnings constitute directions for use was rejected below as counter to the plain meaning of the term. The argument simply does not comport with common sense.

Furthermore, Proposition 65 warnings are not necessarily nonidentical to the warnings required under FHSA. FHSA does not require any specific language in its warnings. The Act merely requires (1) that labels contain the signal word "WARNING" or "CAUTION" and (2) words which describe the potential hazard. Consequently, a message such as the following could comply with both Proposition 65 and FHSA: "Warning, this product contains materials known to the State of California to cause cancer."

Finally, we see no congressional purpose frustrated by Proposition 65. Congress apparently sought to balance its concern for a national safety standard with its desire for the states to promulgate their own sales and warning requirements. The legislative history makes this clear:

> This preemption scheme is designed to meet the competing interests of those who view Federal requirements as merely minimum standards and those who would opt for uniform national requirements.

S. Rep. No. 94-251, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 993, 1004. *See*

*also CSMA v. Lowery*, 452 F.2d 431, 438 (2d Cir. 1971). On the one hand, a national safety standard would ease the burden of compliance for chemical product manufacturers by relieving them from the burden of complying with fifty-one separate regulatory schemes promulgated by each state and the federal government. On the other hand, such a standard would take police powers away from the states who best know how to serve the interests of their citizenry. The preemption clause in FHSA balances these competing concerns by leaving cautionary labeling requirements to the federal government while allowing states to regulate the sale and use of hazardous chemicals. Proposition 65 warnings do not constitute cautionary labeling preempted by FHSA.

AFFIRMED.

## APPENDIX B

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

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Nos. C 90-0211 FMS, C 89-0332 FMS

CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION, INC.,

*Plaintiff,*

v.

CLIFFORD ALLENBY,

*Defendant.*

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Sept. 13, 1990

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Charles A. O'Connor, III, Anthony C. Ching and Donna G. Diamon, McKenna, Conner & Cuneo, Los Angeles, Cal., for plaintiff; Stephen S. Kellner, Chemical Specialties, Washington, D.C., of counsel.

John K. Van de Kamp, Clifford Rechtschaffen, Edward Weil and Craig Thompson, Oakland, Cal., for defendant.

### ORDER GRANTING AND DENYING CROSS-MOTIONS FOR SUMMARY JUDGMENT

FERN M. SMITH, District Judge.

Plaintiff, Chemical Specialties Manufacturing Association (CSMA) is a trade association whose members manufacture a variety of chemical specialty products. Plaintiff filed an action for declaratory judgment in the South-

ern District, seeking a ruling that California's Proposition 65 (Prop 65) warning requirements are preempted by two federal statutes, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*, and the Federal Hazardous Substances Act (FHSA), 15 U.S.C. § 1261 *et seq.* The action was transferred from the Southern to the Eastern District and eventually transferred here soon after this Court granted partial summary judgment for defendant in the related case, *D-Con v. Allenby*, C 89 0332.

Pending before the Court are cross-motions for summary judgment on both the FIFRA and FHSA preemption issues. Plaintiff fails to adequately address this Court's decision in *D-Con v. Allenby*, 728 F.Supp. 605 (N.D.Cal.1989), wherein this Court found that, while FIFRA preempts state pesticide labeling requirements (which defendant conceded), it expressly permits state regulation of pesticide sale and use. Some of the Prop 65 warning methods deemed "safe harbor" methods by the California Health and Welfare Agency, *see* 22 CCR § 12601 *et seq.*, do not constitute "labeling" under FIFRA. Accordingly, the Court held Prop 65 not preempted by FIFRA and granted partial summary judgment in favor of defendant.

Given the earlier ruling on an identical challenge, and the fact that this plaintiff fails to raise any facts or law not previously considered by the Court, defendant's cross-motion for summary judgment as to FIFRA preemption is GRANTED and plaintiff's motion DENIED. The Court incorporates by reference its ruling in *D-Con v. Allenby*, 728 F.Supp. 605. The FHSA preemption issue is addressed below.

The Federal Hazardous Substances Act

The FHSA regulates interstate distribution and sales of hazardous consumer products which are intended for use or are packaged in a form suitable for use in the

household or by children. It also gives the Consumer Product Safety Commission (CPSC), which administers the Act, authority to ban hazardous substances when necessary to protect public health and safety. No overlap exists between the products regulated by the FHSA and those regulated by FIFRA. Unlike FIFRA, the FHSA does not require manufacturers to use a particular, federally approved label; instead the FHSA requires the use of certain warning words (e.g., "caution" or "danger") and allows the manufacturer to decide on the specific warning language.

The FHSA preempts state cautionary label requirements.[1] The statute defines labeling as follows:

> The term "label" means a display of written, printed, or graphic matter upon the immediate container of any substance or . . . upon a tag or other suitable material affixed thereto; and a requirement made by or under authority of this title that any . . . information appear on the label shall not be considered

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[1] "Except as provided . . . if a hazardous substance or its packaging is subject to a cautionary labeling requirement . . . designed to protect against a risk of illness or injury associated with the substance, no State . . . may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical. . . ." 15 U.S.C. § 1261 note (b)(1)(A). (This is the preemption provision currently in effect; it was adopted in 1976. The earlier preemption clause is quoted in footnote 4.)

Prop 65 requires a warning against the risk of cancer or birth defects. Defendant argues that, in many instances, the FHSA cautionary label protects against a different risk of illness or injury (i.e., some harm other than cancer or birth defects). In those instances, a manufacturer presumably could comply with Prop 65 by affixing a cautionary label to the product since the label would not be "designed to protect against the same risk of injury or illness." The Court need not decide whether defendant's reading of the statute is correct; even if a manufacturer could not comply with both Prop 65 and the FHSA via package labeling, other Prop 65 warning methods remain available to it.

> to be complied with unless such . . . information also appears (1) on the outside container or wrapper . . . and (2) on all accompanying literature *where there are directions for use*, written or otherwise.

15 U.S.C. § 1261(n) (emphasis added).[2]

Plaintiff argues that only direct package labeling will satisfy the Prop 65 "clear and reasonable" warning requirement. As previously stated by this Court, determinations as to what does and what does not meet the requirements of Prop 65 are best made by state courts. Plaintiff also contends that the alternative warning methods deemed "safe harbor" provisions by the California Health and Welfare Agency (e.g., point-of-sale signs and telephone information services) are all "labeling" within the meaning of the FHSA.

Defendants argue that the Court need only find that *any* form of warning authorized by the existing regulations falls outside the scope of preempted "labeling" in

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[2] Plaintiff relies on this portion of the statute to support the argument that *all* "accompanying literature" (such as shelf-labeling and other point-of-sale information) constitutes "labeling" under the FHSA. In addition to advancing a strained construction of that language, plaintiff would have the Court read the phrase "where there are directions for use" right out of the statute. That phrase appears repeatedly in reference to "accompanying literature." *See* 16 C.F.R. 1500.3(c)(9) (accompanying literature includes "any placard, pamphlet, booklet, book, sign, or other written or graphic matter or visual device *that provides directions for use* . . . and that is used in connection with the display, sale, demonstration or merchandising of a hazadous substance . . .); 40 C.F.R. § 1500.125 ("[w]hen any accompanying literature *includes or bears directions for use* . . . such placard pamphlet, . . . shall bear all the information required by § 2(p) of this act").

Plaintiff argues that a manufacturer could not lawfully include with its product "accompanying literature" which did not contain the required FHSA warning, even if such literature did *not* contain directions for use. That may be true. What a manufacturer may not do and what a state is preempted from requiring are not necessarily one and the same, however.

order to find Prop 65 not preempted. It is unclear whether plaintiff disagrees with that proposition. Case law squarely supports defendant's view, however. "Federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakenly so ordained." *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1962).[3] *See also Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1976) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"). In this case, the nature of the regulated subject matter—health and safety—is an area traditionally left to the states.

There is little case law interpreting the term "labeling" within the meaning of the FHSA. The two cases relied upon by plaintiff were both decided prior to the Congressional amendment which narrowed the scope of the FHSA's preemption provision[4] and both dealt with state regula-

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[3] The Ninth Circuit notes two practical reasons for this presumption. First, Congress has the power to make preemption clear in the first instance. Second, if a court erroneously finds preemption, a state can do nothing; whereas if the court errs in the other direction, Congress presumably can correct the problem. *Chevron v. Hammond*, 726 F.2d 483, 488 (9th Cir.1984).

[4] The original FHSA "limited preemption amendment", adopted in 1966, declared Congress' intent to "supersede any and all laws of the States . . . insofar as they may . . . provide for cautionary labeling of any substance or article intended for household use . . . which differs from the requirements or exemptions of this Act." In 1976, Congress amended the provision and limited preemption to instances where there is a federal labeling requirement in effect and a State imposes a different labeling requirement that seeks to warn about the same hazards. (The amended clause is quoted, *supra* at footnote 1.)

tions requiring information to be printed on the product label itself. *See CSMA v. Lowery*, 452 F.2d 431 (2d Cir.1971) (New York City regulation required that certain information appear on product container and on the "carton, case, or similar bulk package" housing the product); *CSMA v. Clark*, 482 F.2d 325 (5th Cir. 1973) (local ordinance required information to be printed on the product's "container, wrapping, or other packaging"). Cases dealing with preemption of state "labeling" requirements under other, analogous federal Acts were addressed in the related case of *D-Con v. Allenby*.

The only new case cited by plaintiff is *Professional Lawn Care Association v. Village of Milford*, 909 F.2d 929 (1990, 6th Cir.). *Lawn Care* concerns a challenge to a local ordinance (not a state statute) regulating pesticide use. The Court held that § 24(a) of FIFRA, which expressly allows *state* regulation of pesticide sale and use, extended only to states, not localities. The ordinance was deemed preempted for that reason.

Plaintiff argues that Prop 65 may require warnings in instances where federal law does not so require. That is not disputed. In *Avocado Growers*, 373 U.S. at 132, 83 S.Ct. at 1210-13, the Supreme Court considered divergent state and federal requirements and found "no impossibility of dual compliance." Because there existed "no inevitable collision between the two schemes of regulation, despite the dissimilarity of the standards," the Court declined to find the California law at issue there invalid under the Supremacy Clause.[5] *Id.* 373 U.S. at 143, 83 S.Ct. at 1218. Accordingly, the fact that California may impose stricter standards than does the FHSA does not invalidate the California regulatory scheme.[6]

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[5] California law set the standard for maturity of avocadoes at more than 8% oil by weight, whereas avocadoes were deemed mature under federal law at over 7% oil by weight.

[6] In fact, defendant notes that nothing in the FHSA prevents manufacturers from voluntarily affixing warning labels on products for which labels are not required under federal law.

Finally, plaintiff submits declarations from various individuals, one former EPA Administrator and a number of industry "health and safety" experts, discussing the conflicts between the federal and state laws and the danger presented by "overlabeling." The declarants express concern that additional warnings, such as those required by Prop 65, will reduce consumer confidence in EPA approved labels, thus undermining the FIFRA and FHSA scheme. None of these declarants have any expertise in the area of human psychology. Even if they were absolutely correct, however, Congress clearly did not intend to occupy this entire area of regulation, as evidenced by the fact that states are expressly allowed certain functions under both FIFRA and FHSA. No evidence shows the impossibility of complying with both the federal and state statutes; therefore, Prop 65 is not preempted.

Plaintiff's motion for partial summary judgment is DENIED; defendant's motion is GRANTED.

SO ORDERED.

## APPENDIX C

## STATUTORY PROVISIONS AND REGULATIONS INVOLVED

### 7 U.S.C. § 136(p)(1), (p)(2) (1988)

**§ 136. Definitions**

For purposes of this subchapter—

(p) Label and labeling

(1) Label

The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) Labeling

The term "labeling" means all labels and all other written, printed, or graphic matter—

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

### 7 U.S.C. § 136v(a), (b) (1988)

**§ 136v. Authority of States**

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

**15 U.S.C. § 1261(f)(1)(A), (f)(2), (n) (1988)**

**§ 1261. Definitions**

For the purposes of this chapter—

(f) The term "hazardous substance" means:

(1)(A) Any substance or mixture of substances which (1) is toxic, (ii) is corrosive, (iii) is an irritant, (iv) is a strong sensitizer, (v) is flammable or combustible, or (vi) generates pressure through decomposition, heat, or other means, if such substances or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.

(2) The term "hazardous substance" shall not apply to pesticides subject to the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136 et seq.], nor to foods, drugs and cosmetics subject to the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 et seq.], nor to substances intended for use as fuel when stored in containers and used in the heating, cooking, or refrigeration system of a house, nor to tobacco and tobacco products, but such term shall apply to any article which is not itself a pesticide within the meaning of the Federal Insecticide, Fungicide, and Rodenticide Act but which is a hazardous substance within the meaning of paragraph (1) of this subsection by reason of bearing or containing such a pesticide.

(n) The term "label" means a display of written, printed, or graphic matter upon the immediate container of any substance or, in the case of an article which is unpackaged or is not packaged in an immediate container intended or suitable for delivery to the ultimate consumer, a display of such matter directly upon the article involved or upon a tag or other suitable material affixed thereto; and a requirement made by or under authority of this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears (1) on the outside container or wrapper, if any there be, unless it is easily legible through the outside container or wrapper and (2) an all accompanying literature where there are directions for use, written or otherwise.

**15 U.S.C. § 1261 note (b)(1)(A) (1988)**

EFFECT UPON FEDERAL AND STATE LAW

Pub. L. 86-613, § 18, formerly § 17, July 12, 1960, 74 Stat. 380, as amended Pub. L. 89-756, § 4(a), Nov. 3, 1966, 80 Stat. 1305; renumbered and amended Pub. L. 91-113, § 4(a), (b)(1), Nov. 6, 1969, 83 Stat. 189, 190; Pub. L. 94-284, § 17(a), May 11, 1976, 90 Stat. 510, provided that:

"(b)(1)(A) Except as provided in paragraphs (2) and (3), if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [subsec. (p) of this section or section 1262 (b) of this title] designed to protect against a risk of illness or injury associated with the substance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b) [subsec. (p) of this section or section 1262(b) of this title].

## 16 C.F.R. § 1500.3(c)(9) (1992)

# PART 1500—HAZARDOUS SUBSTANCES AND ARTICLES; ADMINISTRATION AND ENFORCEMENT REGULATIONS

### § 1500.3 Definitions.

(c) *Certain statutory definitions interpreted, supplemented, or provided with alternatives.* The following items interpret, supplement, or provide alternatives to definitions set forth in section 2 of the act (and restated in paragraph (b) of this section):

(9) In the definition of "label" in section 2(n) of the act (restated in paragraph (b)(12) of this section), a provision stipulates that words, statements, or other information required to be on the label must also appear on all accompanying literature where there are directions for use, written or otherwise. To make this provision more specific, "accompanying literature" is interpreted to mean any placard, pamphlet, booklet, book, sign, or other written, printed, or graphic matter or visual device that provides directions for use, written or otherwise, and that is used in connection with the display, sale, demonstration, or merchandising of a hazardous substance intended for or packaged in a form suitable for use in the household or by children.

## Cal. Code Regs. tit. 22, § 12601(b) (1991)

### Article 6. Clear and Reasonable Warnings

### § 12601. Clear and Reasonable Warnings.

(b) Warnings for consumer products exposures which include the methods of transmission and the warning messages as specified by this subdivision shall be deemed to be clear and reasonable. A "consumer products exposure" is an exposure which results from a person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good, or any exposure that results from receiving a consumer service.

(1) The warning may be provided by using one or more of the following methods singly or in combination:

(A) A warning that appears on a product's label or other labeling. The term "label" means a display of written, printed or graphic matter upon a product or its immediate container. The term "labeling" means any label or other written, printed or graphic matter affixed to or accompanying a product or its container or wrapper.

(B) Identification of the product at the retail outlet in a manner which provides a warning. Identification may be through self labeling, signs, menus, or a combination thereof.

(C) A system of signs, public advertising identifying the system and toll-free information services, or any other system, that provides clear and reasonable warnings.

(D) For alcoholic beverages, including, without limitation, beer, malt beverages, wine and distilled spirits:

1. Primarily intended for consumption off the premises where sold or distributed:

(i) at least one notice or sign, no smaller than 10 inches wide by 10 inches high, and bearing the warning message set forth in paragraph (4)(E) of this subsection; or

(ii) at least one horizontal strip marker no smaller than 10½ inches wide by 1¼ inches high, and bearing the warning message set forth in paragraph (4)(E) of this subsection; or

(iii) a notice no smaller than 5 inches by 5 inches, and bearing the warning message set forth in (4)(E) of this subsection.

(iv) If signs 10 inches high by 10 inches wide are used, the word "warning" shall be centered three-quarters of an inch from the top of the sign in ITC Garamond bold condensed type face all in one-inch capital letters. Three-sixteenths of an inch from the base of the word "warning" shall be a line extending from left to right across the width of the sign one-sixteenth of an inch in thickness. Centered one-half inch below the line shall be the body of the warning message in 36/50 ITC Garamond bold condensed type face with the intial letter of each word, other than the conjunctive "and," capitalized. For the body of the warning message, left and right margins of at least one-half of an inch, and a bottom margin of at least one-half inch shall be observed. Larger signs shall bear substantially the same proportions of type size and spacing to sign dimension as the sign 10 inches high by 10 inches wide.

(v) If the 10½ inch by 1¼ inch horizontal strip markers are used, the word "WARNING," punctuated by a colon, shall be justified left and located three-sixteenths of an inch from the top of the strip notice in ITC Garamond bold condensed type face all in capital letters measuring eleven sixteenths of an inch in height. Three thirty-seconds of an inch from the base of the word "WARNING" shall be a line extending from left to right across the width of the word "WARNING" and the punctuating colon one thirty-second of an inch in thickness. Located one-fourth of an inch from the top and one-fourth of an inch from the bottom of the strip notice, and to the immediate right of the word "WARNING," shall be the body of the warning message in 12/16 point ITC Gara-

mond bold condensed type face with the initial letter of each word, other than the conjunctive "and," capitalized. The word "WARNING" shall be one-half inch from the left edge of the strip notice and the requisite warning message shall extend to within one-half inch from the right edge.

(vi) If the 5 inch by 5 inch signs are used, they shall bear substantially the same proportions of type size and spacing to sign dimension as the sign 10 inches high by 10 inches wide, with both the word "WARNING" and the warning text set in white on a contrasting red background.

(vii) Such sign or notice shall be placed in the retail establishment so as to assure that it is readable and likely to be read either at each retail point of sale or each point of display. Such sign or notice shall be placed either at all retail points of sale or all points of display, but need not be placed at both. If 10 inch by 10 inch signs or notices are placed at the point of display, each shall be placed no more than ten feet from any alcoholic beverage container and in a manner associating the sign or notice with the display. If horizontal strip notices are used, they shall be placed at ten foot intervals horizontally along the display. If a 5 inch by 5 inch sign is used, it shall be conspicuously placed at each retail point of sale (e.g., checkout counter, cash register, cash box) so that it is likely to be read and understood during the sales transaction.

(viii) All measurements specified or referred to in paragraphs (iv), (v) and (vi), above, are not required to be precisely accurate.

2. Provided for consumption on the premises at tables served by food or beverage persons, or sold or distributed through over the counter service;

(i) a notice or sign displayed at each of the tables where alcoholic beverages are served or may be con-

sumed at least 5 inches high by 5 inches wide bearing substantially the same type face and substantially the same proportion of type size and spacing to sign dimension as described in paragraph (D)1. (vi); or

(ii) the warning message set forth in paragraph (4)(E) of this subdivision, placed upon a menu or list in association with the alcoholic beverages listed thereon and served at such premises, or if alcoholic beverages are not listed thereon, on any menu or list provided to patrons in association with the listing of food or beverages offerings, in type size and design, such that the text is conspicuous and likely to be read prior to consumption of alcoholic beverages or,

(iii) at least one 10 inch by 10 inch sign, meeting the specifications set forth in paragraph (D)1. (iv) of this subsection, placed so that it is readable and likely to be read by patrons as they enter each public entrance to the establishment. If the establishment does not have clearly defined physical boundaries delineating those areas where, by permit or license, alcoholic beverages are served, the 10 inch by 10 inch sign shall be posted so that it is readable and likely to be read by patrons as they enter the area or areas where, by permit or license, alcoholic beverages are served; and

(iv) If sold or distributed through over-the-counter service, at least one sign, meeting the specifications set forth in paragraph (D)1. (iv) of this subsection, placed in the retail establishment so that the warning message is, prior to the consumption of alcoholic beverages, readable and likely to be read from all counter locations available to the public. Therefore, a retail establishment providing a warning pursuant to the preceding sentence, also would be required to provide a warning in accordance with either paragraph 2.(i), 2.(ii) or 2.(iii) of this subsection.

3. For premises which are specially licensed to sell and serve alcoholic beverages both on and off the licensed premises (e.g., in facilities that offer both "tasting" and retail sales), the off-sale portion of the premises shall comply with the provisions of subsection (D)1, above, and the portion of the premises where alcoholic beverages are served shall comply with the provisions of subsection (D)2, above.

4. For alcoholic beverages sold or distributed to consumers through the mail or package delivery services, warnings may be provided by incorporating or placing the warning message set forth in paragraph (4)(E) on or in the shipping container or delivery package in such a manner so that the warning message is likely to be read by the recipient prior to consumption of the alcoholic beverage(s).

5. All signs or notices referred to in subsections (D)1., (D)2. and (D)3., above, shall be displayed so that they are clearly visible under all lighting conditions normally encountered during business hours.

(2) To the extent practicable, warning materials such as signs, notices, menu stickers, or labels shall be provided by the manufacturer, producer, or packager of the consumer product, rather than by the retail seller. For alcoholic beverages, the placement and maintenance of the warning shall be the responsibility of the manufacturer or its distributor at no cost to the retailer, and any consequences for failure to do the same shall rest solely with the manufacturer or its distributor, provided that the retailer- does not remove, deface, or obscure the requisite signs or notices, or obstruct, interfere with, or otherwise frustrate the manufacturer's reasonable efforts to post, maintain, or periodically replace said materials. For prescription drugs, the labeling approved or otherwise provided under federal law and the prescriber's accepted practice of obtaining a patient's informed consent shall be deemed to be a clear and reasonable warning.

(3) The warnings provided pursuant to paragraphs (1)(A) and (1)(B) shall be prominently placed upon a product's label or other labeling or displayed at the retail outlet with such conspicuousness, as compared with other words, statements, designs, or devices in the label, labeling or displays as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use.

(4) The warning message must include the following language:

(A) For consumer products that contain a chemical known to the state to cause cancer:

"WARNING: This product contains a chemical known to the State of California to case cancer."

(B) For consumer products that contain a chemical known to the state to cause reproductive toxicity:

"WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm."

(C) For food, other than alcoholic beverages, sold, served, or otherwise provided in food facilities, as defined in Health and Safety Code section 27521(a), which is intended for immediate consumption:

"WARNING: Chemicals known to the State of California to cause cancer, or birth defects or other reproductive harm may be present in foods or beverages sold or served here."

(D) For fresh fruits, nuts and vegetables:

"WARNING: This product may contain a chemical known to the State of California to cause cancer, or birth defects or other reproductive harm."

(E) For alcoholic beverages, including, without limitation, beer, malt beverages, wine and distilled spirits:

"WARNING: Drinking Distilled Spirits, Beer, Coolers, Wine and Other Alcoholic Beverages May Increase Can-

cer Risk, and, During Pregnancy, Can Cause Birth Defects."

(5) A person in the course of doing business, who manufactures, produces, assembles, processes, handles, distributes, stores, sells or otherwise transfers a consumer product which he or she knows to contain a chemical known to the state to cause cancer or reproductive toxicity in an amount which requires a warning shall provide a warning to any person to whom the product is sold or transferred unless the product is packaged or labeled with a clear and reasonable warning.

## Cal. Health & Safety Code § 25249.6 (West Supp. 1992)

**§ 25249.6 Required warning before exposure to chemicals known to cause cancer or reproductive toxicity**

No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10.

(Added by Initiative Measure, Nov. 4, 1986.)

## Cal. Health & Safety Code § 25249.11(f) (West Supp. 1992)

**§ 25249.11 Definitions**

For purposes of this chapter:

(f) "Warning" within the meaning of Section 25249.6 need not be provided separately to each exposed individual and may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, placing notices in public news media, and the like, provided that the warning accomplished is clear and reasonable. In order to minimize the burden on retail sellers of consumer products including foods, regulations implementing Section 25249.6 shall to the extent practicable place the obligation to provide any warning materials such as labels on the producer or packager rather than on the retail seller, except where the retail seller itself is responsible for introducing a chemical known to the state to cause cancer or reproductive toxicity into the consumer product in question.

(Added by Initiative Measure, Nov. 4, 1986.)

## APPENDIX D

Advisory Op. No. 312

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

Office of the General Counsel

March 6, 1991

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Gentlemen:

This is in response to a request from the Chemical Specialties Manufacturers Association for an advisory opinion from the Consumer Product Safety Commission addressing the following question.

> Do the signal word and principal statement of hazard "WARNING: This product contains a chemical known to the state to cause cancer (or birth defects)," when used in connection with the sale (*e.g.*, shelf sign, brochure, display sign) of an FHSA hazardous substance constitute "directions for use" pursuant to FHSA § 2(n), 15 U.S.C. § 1261(n), thereby rendering them accompanying literature subject to the labeling requirements of FHSA § 2(p), 15 U.S.C. § 1261(p)?

This office has also received correspondence from the State of California concerning how the Commission interprets the Federal Hazardous Substances Act ("FHSA") as it concerns issues raised by California's Safe Drinking Water and Toxic Enforcement Act (Proposition 65). Because the answer to CSMA's question is relevant to these concerns, this letter is also being sent to the California Department of Justice.

The FHSA provides a comprehensive scheme for ensuring that hazardous substances intended for use in the household or by children bear cautionary labeling. Included within the FHSA's definition of hazardous substances are those substances that are toxic because they present a risk of cancer or other types of chronic toxicity, such as reproductive toxicity. CPSC General Counsel's Advisory Opinion No. 309 at 7 (March 19, 1987). Thus, a product would be regulated under the FHSA if (1) it is intended or packaged in a form suitable for use in the household or by children and (2) if the exposure to the product creates a significant risk of cancer or reproductive toxicity as a proximate result of any customary or reasonably foreseeable handling or use.

Section 2(p)(1) of the FHSA requires hazardous substances to bear certain types of label messages. Included within the types of labeling required are:

1. The name of each component that contributes substantially to the hazard,

2. A signal word (in the case of chronic hazards, "WARNING" or "CAUTION"),

3. An affirmative statement of the hazard or hazards (*e.g.*, "Vapor harmful"),

4. Precautionary measures describing the action(s), to be taken or avoided,

5. Any necessary or appropriate instruction for first aid treatment,

6. Any required instruction for special handling or storage of the package, and

7. The statement "Keep out of the reach of children," or its equivalent.

FHSA Sec. 2(p)(1)(B), (D)-(J)(i), 15 U.S.C. § 2(p)(1)(B), (D)-(J)(i). Except for the signal word, the FHSA generally does not require particular label language and permits manufacturers to decide on the specific language. (In addition, the Commission may, by rule, require different or additional labeling where required by a special hazard presented by the substance. Section 3(b) of the FHSA, 15 U.S.C. § 1262(b). Where labeling cannot adequately protect the public, the Commission may ban a hazardous substance. Sec. 2(q)(1)(B), 15 U.S.C. § 1261(q)(1)(B).)

Section 2(n) of the FHSA defines "label." In addition to specifying that matter on the product or its container is part of the label, section 2(n) reads, in pertinent part:

> a requirement [under the FHSA] that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears . . . (2) on all *accompanying literature where there are directions for use*, written or otherwise.

15 U.S.C. 1261(n) (emphasis added). In other words, where accompanying literature contains directions for use, it must contain *all* the cautionary labeling required on the product label by the FHSA.

The Commission's regulations specify that:

> "accompanying literature" is interpreted to mean any placard, pamphlet, booklet, book, sign, or other written, printed, or graphic matter or visual device that

> provides *directions for use*, written or otherwise, and that is used in connection with the display, sale, demonstration, or merchandising of a hazardous substance . . . .

16 C.F.R. § 1500.3(c)(9) (emphasis added). Shelf signs, brochures, and display signs are "accompanying literature" under this definition.

A warning that a product can cause cancer or birth defects is not an express direction for use. Nevertheless, it conveys the information that, in using the product, steps should be taken to minimize or eliminate exposure. Stated another way, the warning itself can also serve as a direction for use. An example of the dual function performed by statements warning of hazards a product presents is in the Commission's regulations at 16 C.F.R. § 1500.123. That section states:

> Whenever the statement of the principal hazard or hazards itself provides the precautionary measures to be followed or avoided, a clear statement of the principal hazard will satisfy the requirements of section 2(p)(1)(E) [statement of principal hazard] and
>
> (F) ["precautionary measures describing the action to be followed or avoided"] . . .

Thus, for example, a product having flammable vapors might have a statement of principal hazard, such as "FLAMMABLE," that could serve also as the required statement of action to be avoided, which, if stated separately, might read "do not use near open flame." Similarly, the statement of principal hazard "HARMFUL IF SWALLOWED" could negate the need to state additionally "for external use only." Also, the statement "VAPOR HARMFUL" could also serve instead of an additional statement to "avoid prolonged inhalation of vapors."

Therefore, although the warning quoted in your inquiry does not necessarily convey specific actions to be taken in

the use of the product, it does convey information about how the product should be used (steps should be taken to reduce exposure). Accordingly, this office views the statement as a direction for use. It follows, therefore, that signs and the like bearing such warnings are "accompanying literature containing directions for use" and thus are labeling under FHSA § 2(n). The fact that such signs are considered labeling, however, does not mean that the sign complies with any or all of the FHSA labeling requirements described above.

I trust that this information responds fully to your inquiry. Please contact me if you have further questions.

Sincerely,

/s/ Clement D. Erhardt, III
CLEMENT D. ERHARDT, III
General Counsel